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**THIS DISPOSITION
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Paper No. 9
DEB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Candle Corporation of America

Serial No. 75/469,369

Clay A. Tillack,¹ Stuart I. Graff and Patricia M. DeSimone of Schiff Hardin & Waite for Candle Corporation of America.

Idi Aisha Clarke, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Seeherman, Bucher and Bottorff, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Candle Corporation of America has appealed from the refusal of the Trademark Examining Attorney to register CANNED HEAT as a trademark for "solid fuel composed mainly of alcohol for use in warming food."² Registration has been refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1), on

¹ The Trademark Examining Attorney argues that Mr. Clay A. Tillack has not been authorized to represent applicant. While Mr. Tillack is nowhere listed on the firm letterhead and has not been specifically mentioned in a power of attorney, her objection is not well taken. Mr. Tillack is an attorney who upon signing and filing the Notice of Appeal in this case is authorized to represent applicant in this matter. See 37 C.F.R. §10.14 and TBMP §114.03.

² Application Serial No. 75/469,369, filed April 17, 1998. The application is based upon asserted dates of first use and first use in commerce on January 12, 1915.

the ground that applicant's alleged mark is merely descriptive of its identified goods.

Applicant and the Examining Attorney have filed briefs. Applicant did not request an oral hearing.

We affirm the refusal of registration.

In the initial Office action, the original Trademark Examining Attorney submitted a dictionary entry defining "canned heat" as "fuel packaged to be used in small cans for heating, as with chafing dishes or in portable stoves."³ Furthermore, she introduced into the record fifty-five LEXIS/NEXIS stories, many of which used the term "canned heat" in the manner of a generic term. In fact, the Trademark Examining Attorney concluded from the weight of the evidence that the applied-for mark was actually "a generic term for the identified goods."

In response, applicant argued that the term is suggestive at worst, requiring the exercise of one's imagination to reach any conclusion that the product is an alcohol-based fuel used to warm food. In response to the single dictionary entry placed in the record by the Trademark Examining Attorney, applicant cited to eleven different dictionaries wherein nine had no "canned heat" entries and two dictionaries had entries that recognized "Canned Heat" as a trademark. Furthermore, applicant contended

³ Random House Webster's Unabridged Dictionary (Electronic Version) 1996.

that a close examination of the NEXIS stories reveals fewer incidents than the number of damaging "hits" quoted by the Trademark Examining Attorney, and that these were simply occasions where organizations, merchants or journalists had apparently misused its trademark. Furthermore, applicant argued that its predecessors in interest had owned a federal trademark registration for CANNED HEAT (that was inadvertently permitted to lapse), and applicant submitted a copy of a settlement agreement from a competitor (resulting from earlier litigation) recognizing applicant's rights in the mark "CANNED HEAT."

In the Office's final refusal, the Trademark Examining Attorney conceded that the term "Canned Heat" may have been a good trademark when it was first used in 1915. However, she contended that it has since become generic, and submitted additional evidence in support of this position (e.g., Web pages drawn from the Internet, more uses taken from LEXIS/NEXIS stories, a second dictionary entry, and uses in the identifications of goods of federal trademark applications).

In its brief, applicant maintains that its trademark is not descriptive, and that it is certainly not a generic term. Applicant also argues, in the alternative, that if the Board should find CANNED HEAT to be merely descriptive, the term has acquired distinctiveness through more than eighty-five years of promotion and use. In support of this claim, applicant noted

that earlier in the prosecution of this application, it had proven such distinctiveness with the submission of a settlement agreement signed by a competitor.

It continues to be the position of the newly-assigned Trademark Examining Attorney in her appeal brief that CANNED HEAT "immediately conveys information" about the goods because the goods are "fuel in a can."

We begin by noting that the only issue before the Board in this case is whether the term "Canned Heat" is precluded from registration on the Principal Register under the provisions of Section 2(e)(1) of the Lanham Act as being merely descriptive. In its appeal brief, applicant, for the first time, argues that this mark has acquired distinctiveness. The problem is that applicant should have made such a claim during the prosecution of its application, and not waited until it filed its brief to make these assertions. Accordingly, because this issue was not raised in a timely manner, we have not given it any consideration in reaching our decision.

Although applicant argues CANNED HEAT is inherently distinctive, the weight of the evidence as a whole compels us to find otherwise. The real issue herein is public perception of applicant's alleged mark, and judged by that measure, we find this term, in the year 2001, to be, at the very least, merely descriptive.

As applicant correctly argued, some of the articles the Trademark Examining Attorney drew from the LEXIS/NEXIS database do not support her refusal. Three "hits" suggest trademark usage in that they have the words in quotation marks ("canned heat") and/or with the initial letter of each word in an upper case format (Canned Heat). Four of the citations were to a blues rock band known as "Canned Heat", five of the excerpts were citations to foreign publications or wire-service stories, five other entries were "noise," plucked from the database merely because the word "canned" occurred in close proximity to the word "heat" (e.g., "*Canned or heat* sterilized seafoods..."), and some of the stories appeared more than once.

On the other hand, a majority of the references placed into the record by the Trademark Examining Attorney, from LEXIS/NEXIS and from the Internet, demonstrate a variety of contexts in which this term was used interchangeably with alcohol burner, cooking fuel, chafing fuel, gels or solid gels, canned fuel, etc. Irrespective of the manufacturer, the references are to a product much like applicant's, namely a gelled fuel in a canister used for cooking or heating foods. The term "Canned Heat" (without quotation marks in the originals) was used in listings of emergency supplies put out by the Federal Emergency Management Administration (FEMA) as well as in newspaper articles providing guidance on emergency supplies, survival

kits, and hurricane preparedness. The term was also used in articles referring to those in the catering industry and to vendors of food warmers, cookware and chafing dishes. This pervasive usage of the term "canned heat" in a non-trademark sense to refer to gelled fuels for cooking or heating foods is consistent with several dictionary definitions placed into the record by the Trademark Examining Attorney.

In arguing that its mark is not merely descriptive, applicant takes the position that these two English-language words, combined in this manner (the admittedly descriptive word "canned" followed by the admittedly descriptive word "heat"), are *not* able *immediately* to convey information to prospective consumers about its cans of chafing fuel.

However, because our decision must turn on current public perceptions, we cannot analyze this question in a vacuum, and look only to the words alone. Rather, we must look to all the evidence which is of record, and the evidence, as indicated above, shows that canned heat is used as a term for goods identified in applicant's application. Accordingly, we find that it immediately and directly conveys to consumers what the goods are.

As to applicant's contention that this term was the subject of a federal registration from 1916 until 1996, the question of whether or not the term "Canned Heat" was inherently distinctive

when it was previously registered in 1916 is not before us. It has been consistently held that an expired registration merely constitutes evidence that the registration issued, and hence an expired registration is incompetent as evidence of any presently existing rights in the term which had been the subject matter of the registration. See Sunnen Products Co. v. Sunex Int'l Inc., 1 USPQ2d 1744, 1747 (TTAB 1987). Whatever benefits pertained to the registration, including the evidentiary presumptions afforded by Section 7(b) of the Trademark Act, 15 U.S.C. §1057(b), are lost when the registration expires or is canceled. See Anderson, Clayton & Co. v. Krier, 478 F.2d 1246, 178 USPQ 46, 47 (CCPA 1973). As noted above, the issue to be determined is not whether the term sought to be registered was merely descriptive in 1916, but whether such term is presently merely descriptive, at the time registration is currently sought.

Decision: The refusal to register is affirmed.